

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

ANGELA M. SEAL,)	CASE NO. 3:07CV00017
)	
Plaintiff,)	
)	
v.)	<u>REPORT AND RECOMMENDATION</u>
)	
MICHAEL J. ASTRUE, Commissioner)	
of Social Security,)	By: B. Waugh Crigler
)	U. S. Magistrate Judge
Defendant.)	

This challenge to a final decision of the Commissioner which denied plaintiff's December 15, 2004 applications for a period of disability, disability insurance benefits and supplemental security income benefits under the Social Security Act (Act), as amended, 42 U.S.C. §§ 416, 423 and 1381 et seq. is before this court under authority of 28 U.S.C. § 636(b)(1)(B) to render to the presiding District Judge a report setting forth appropriate findings, conclusions and recommendations for the disposition of the case. The questions presented are whether the Commissioner's final decision is supported by substantial evidence, or whether there is good cause to remand for further proceedings. 42 U.S.C. § 405(g). For the reasons that follow, the undersigned will RECOMMEND that an Order enter DENYING the both parties' motion for summary judgment to the extent they seek either affirmation or reversal but, for good cause shown, GRANTING the plaintiff's alternative motion to remand and REMANDING this case under Sentence Four of 42 U.S.C. § 405(g) to the Commissioner for further proceedings.

In a decision eventually adopted as a final decision of the Commissioner, an Administrative Law Judge (Law Judge) found that plaintiff had an alleged disability onset date of June 30, 1994; she had not engaged in substantial gainful activity during the relevant time

period¹; and she was insured for benefits through January 13, 2007, the date of his decision. (R. 14, 21.)² The Law Judge determined that plaintiff suffered depression, an anxiety disorder, hypothyroidism and mitral valve prolapse, which are severe impairments, though not severe enough to meet or equal any listed impairment. (R. 15, 21.) The Law Judge further found that her allegations concerning her functional limitations and their impact on her ability to work were exaggerated and “not totally credible,” and he concluded that she possessed the residual functional capacity (“RFC”) to perform a “wide range of work at the sedentary level of exertion.” (R. 18-19, 21.) Specifically, the Law Judge determined that plaintiff could lift or carry up to ten pounds, walk and stand for two hours in an eight-hour workday with normal breaks, sit for six hours in an eight-hour workday, and she should be able to alternate between sitting and standing at will. (R. 18, 21.) He also found that her depression and anxiety disorder resulted in mild restrictions on her activities of daily living; moderate difficulties in maintaining social functioning; and moderate difficulties maintaining concentration, persistence or pace, which required she work in a low stress work environment with minimal interpersonal interaction with the general public. (*Id.*) The Law Judge concluded that this RFC precluded her from performing her past relevant work. (R. 19, 21.) By application of the Medical-Vocational Guidelines (“grids”) as a framework for decision making and by reference to evidence offered by the vocational expert (VE), the Law Judge determined that jobs in the economy were available to

¹The Law Judge found that although she worked after her alleged disability onset date, the work was not substantial gainful activity. (R. 15.)

²The Law Judge noted that plaintiff had filed previous applications for disability insurance benefits and supplemental security income on March 9, 2000 and April 15, 2001. (R. 14.) Both applications were denied at the initial or reconsideration levels without further administrative or judicial appeal. (*Id.*)

plaintiff. (R. 19-22.) Thus, the Law Judge ultimately concluded that she was not disabled under the Act. (R. 20, 22.)

Plaintiff appealed the Law Judge's decision to the Appeals Council, and while on appeal, she submitted additional evidence. (R. 274-278.) Finding no reason under the applicable rules, and concluding that the information provided on administrative appeal did not provide a basis for changing the Administrative Law Judge's decision, the Appeals Council denied review and adopted the Law Judge's decision as the final decision of the Commissioner. (R. 5-7.) This action ensued.

Notwithstanding fairly extensive briefing by both sides in this case over the substantiality of the medical evidence to support either a grant or denial of benefits, a decision here should not long detain the court. Plaintiff proved a *prima facie* case of disability by demonstrating and by the Law Judge's finding that she suffered severe impairments, both physical and mental, which prevent her from performing her past relevant work. (R. 15, 19, 21.) See 20 C.F.R. §§ 404.1520, 416.920. Moreover, the Law Judge detailed in his decision the various limitations on plaintiff's ability to perform any work-related activity, particularly given her mental impairments. (R. 18, 21.)

Now, the burden in the sequential evaluation shifted to the Commissioner to come forward with evidence that alternate gainful work was available to a person with plaintiff's maladies and their effects. Because she was found to suffer impairments which produced non-exertional limitations, the Law Judge was not entitled to rely solely on the grids to deny the claim, and vocational evidence was necessary to determine the availability of alternate gainful work. See 20 C.F.R. §§ 404.1569, 416.969, and Part 404, Subpart P, Appendix 2, § 200.00; *Hall*

v. Harris, 658 F.2d 260 (4th Cir. 1981); *Smith v. Bowen*, 837 F.2d 635 (4th Cir. 1987).

In that connection, it is critical that the VE be entitled to consider all relevant substantial evidence in arriving at any opinion about the availability of work. *Walker v. Bowen*, 889 F.2d 47 (4th Cir. 1989). This would include, though may not be limited to, any findings made by the Law Judge about plaintiff's functional capacity.³

In this case the Law Judge's hypothetical questions represented a RFC less restrictive than that which the Law Judge later would find when rendering his decision. (Compare R. 21, Finding 6 with R. 288-289.) By the same token, the questions posed by plaintiff's counsel contained restrictions exceeding those found to exist by the Law Judge. In neither case was the VE permitted to opine on facts actually found to exist by the Law Judge, irrespective of whether those findings were supported by substantial evidence. To put it another way, the VE never had the opportunity to determine whether jobs were available to a person with the very limitations the Law Judge later would find to be present.

Accordingly, there has been an inadequate adjudication of the claim, and "good cause" exists to remand the case for further proceedings at the final sequential level.

For these reasons, it is RECOMMENDED that an Order enter DENYING both parties' motions for summary judgment to the extent they seek either affirmation or reversal but, for good cause shown, GRANTING the plaintiff's alternative motion to remand and REMANDING this case under Sentence Four of 42 U.S.C. § 405(g) to the Commissioner for further proceedings

³There could be circumstances where the substantial evidence demonstrates either a more or less restricted functional capacity than that found by the Law Judge. Those should be considered by the VE in order to ensure a more reliable assessment of whether jobs are available under those hypothetical circumstances.

at the final level of the sequential evaluation. The Order should direct that, in the event he is unable to grant benefits on the current record, the Commissioner is to recommit the case to a Law Judge for additional evidentiary proceedings where both sides may introduce additional evidence and the Law Judge can consider for the first time the evidence proffered on administrative appeal.

The Clerk is directed to immediately transmit the record in this case to the presiding United States District Judge. Both sides are reminded that pursuant to Rule 72(b) they are entitled to note objections, if any they may have, to this Report and Recommendation within (10) days hereof. Any adjudication of fact or conclusion of law rendered herein by the undersigned not specifically objected to within the period prescribed by law may become conclusive upon the parties. Failure to file specific objections pursuant to 28 U.S.C. § 636(b)(1)(C) as to factual recitations or findings as well as to the conclusions reached by the undersigned may be construed by any reviewing court as a waiver of such objection. The Clerk is directed to send a certified copy of this Report and Recommendation to all counsel of record.

ENTERED: _____
U.S. Magistrate Judge

Date